PATENT
674509-2027

#6

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant(s):	Borch
Application Serial No.:	09/856,819
Filed:	Unknown
And/Or :	The National Stage of PCT/DK99/00664 and/or any U.S. application that claims priority or continuing status from USSN 09/86,819 and/or PCT/DK99/00664
Examiner:	Unknown
Group Art Unit:	Unknown

745 Fifth Avenue, New York, New York 10151

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Charles Jackson
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PROTEST AND/OR PAPER CALLING ATTENTION TO APPLICATION OF ANOTHER AND JUDICIAL ACTION, AND REQUESTING SUSPENSION OF PROSECUTION AND INTERFERENCE

Commissioner for Patents
Washington, D.C. 20231

Sir:

INTRODUCTION

IDENTITY OF PROTESTORS; STATEMENT OF RELIEF REQUESTED

The plaintiffs in the attachment hereto – a Complaint by Danisco A/S and Jørn Borch SØE against Novo Nordisk and Novozymes being concurrently filed in the U.S. District Court for the Southern District of New York – through their attorneys who have an address of FROMMER LAWRENCE & HAUG LLP, 745 Fifth Avenue, NY, NY 10151, hereby Protest any issuance of the above-captioned applications and respectfully request suspension of

prosecution in those applications until final adjudication of the issues in the judicial action of the attachment hereto, and declaration of an interference thereafter.

SERVICE ON APPLICANT

As the attorneys of record for the above-captioned applications are not known, this paper is being filed in duplicate, and it is respectfully requested that the PTO serve a copy of this paper on the attorneys of record in the above-captioned applications.

THE DOCUMENTS UPON WHICH THE PROTEST IS BASED

This Protest is based upon the following documents:

1. The Complaint attached hereto.
2. Co-pending application Serial No. 09/727,852 of Jørn Borch SØE which is believed to claim interfering subject matter with the above-captioned applications, and which is believed can be amended to include claims that interfere with the above-captioned applications, as may be suggested by the Examiner.

A concise statement of the relevance of the documents cited herein is: that the documents cited herein show that an issue as to the inventorship on the above-captioned applications is pending before a Court, and that a third party, Jørn Borch SØE, has a pending application that is believed to be interfering, and that there may be confidential information available as prior art against the above-captioned applications.

BASES FOR PROTEST - EXPLANATION OF RELEVANCE OF CITED DOCUMENTS

From information received from the USPTO PCT Legal Office, U.S. application Serial No. 09/856,819 is the national stage of PCT/DK99/00664.

As shown by the attachment hereto, there is a judicial action involving inventorship in PCT/DK99/00664 and U.S. application Serial No. 09/856,819 and/or any U.S. application that claims priority or continuing status from or is the national stage of PCT/DK99/00664, published as WO 00/32758. Thus, during the pendency of the judicial action, until final adjudication of the issues therein, it is believed proper that prosecution of the above-captioned applications, e.g., U.S. application Serial No. 09/856,819 and/or any U.S. application that claims priority or continuing status from or is the national stage of PCT/DK99/00664, published as WO 00/32758 be suspended; and such action is respectfully requested. Furthermore, an interference between the above-captioned applications and USSN 09/727,852, advantageously after final adjudication of the issues in the judicial action, is also believed proper and is respectfully requested.

More specifically, Applicant Jørn Borch SØE in USSN 09/727,852, has claimed priority or a continuing status under 35 U.S.C. § 120 from PCT/DK99/00664 (published as WO 00/32758); also, USSN 09/727,852 incorporates by reference PCT/DK99/00664 (published as WO 00/32758). Further still, USSN 09/727,852 contains claims substantially copied from PCT/DK99/00664 (published as WO 00/32758).

Accordingly, it is believed that the above-captioned applications, e.g., USSN 09/856,819 and USSN 09/727,852 interfere or can be amended to contain interfering claims, such that a declaration of interference is believed proper, and is hereby respectfully requested.

However, as shown by the attachment hereto, PCT/DK99/00664 presently does not name Jørn Borch SØE, and he and his assignee are pursuing a judicial action to have him so named as an inventor on PCT/DK99/00664, so that his claim of priority or continuing status in USSN 09/727,852 may be perfected.

Accordingly, while a declaration of an interference between USSN 09/727,852 and the above-captioned is respectfully requested, it is also respectfully requested that prior thereto that the prosecution of U.S. application Serial No. 09/856,819 and/or any U.S. application that claims priority or continuing status from or is the national stage of PCT/DK99/00664, published as WO 00/32758 be suspended, during the pendency of the judicial action, until final adjudication of the issues therein, as those issues materially impact on such an interference and the declaration thereof.

Simply, it is respectfully submitted that the issue of inventorship is critical to, and must be decided prior to, any interference.

Relief requested in the judicial action - having the named on PCT/DK99/00664, published as WO 00/32758 and U.S. application Serial No. 09/856,819 and/or any U.S. application that claims priority or continuing status from or is the national stage of PCT/DK99/00664, published as WO 00/32758 - it is submitted, will allow Jørn Borch SØE to perfect his claim under 35 U.S.C. §120 of continuing status from PCT/DK99/00664, published as WO 00/32758, in USSN 09/727,852.

Once Jørn Borch SØE has so perfected his claim of continuing status, it is believed that in the herein requested interference, neither party will be either Senior party or Junior party. That is, it is believed that the interfering subject matter was first in PCT/DK99/00664, published as WO 00/32758 (and that Jørn Borch SØE is an inventor of that subject matter).

In an interference, the burden of proof on a party is based on his status as either Junior party or Senior party. If neither party in an interference is the Junior party or Senior party, then, it is believed that the parties will have the same burden of proof.

Accordingly, if the issues in the judicial action are not permitted to be adjudicated prior to the herein requested interference, i.e., if there is declaration of the herein requested interference prior to final adjudication of the issues in the judicial action, Jørn Borch SØE could be Junior Party in that interference (because his claim of continuing status to PCT/DK99/00664, published as WO 00/32758 will not have been perfected because he will not have been named as an inventor thereon as the Defendants will not have been Ordered to name him as an inventor thereon, such that only the Defendants will enjoy the filing date of PCT/DK99/00664, published as WO 00/32758 in the interference). And therefore, Jørn Borch SØE will bear an undue burden of proof in the herein requested interference if it is declared prior to the resolution of the judicial action.

More in particular, to determine the filing dates to accord to the parties in the herein requested interference, and thus the status of the parties to that interference (e.g., Junior Party, Senior Party, neither party Junior or Senior Party), the issues in the judicial action must first be adjudicated; and, if the interference is declared without prior resolution of the issues of the judicial action, then Jørn Borch SØE will be severely prejudiced in the interference, e.g., by bearing an undue burden of proof.

Thus, suspension of prosecution - until the issues in the judicial action are finally adjudicated - in U.S. application Serial No. 09/856,819 and/or any U.S. application that claims priority or continuing status from or is the national stage of PCT/DK99/00664, published as WO 00/32758 seems to be the mechanism to prevent a premature declaration of interference and severe prejudice in an interference to Jørn Borch SØE.

In addition, the alternative – declaration of the herein requested interference prior to final adjudication of the issues in the judicial action – can result in delays and inefficiencies in that interference and expense to the PTO and the parties. For example, if during the interference Danisco and Jørn Borch SØE are successful in the judicial action, then the interference may have to be redeclared, and perhaps periods therein such as the motions or testimony periods reopened and gone through anew in light of the redeclaration of the interference. This can add delays and expense to the interference and expense to the PTO and parties. Further still, the outcome of the

judicial action could even obviate the need for an interference. Thus, suspension of prosecution, as herein requested is in the interests of the potential parties to the interference and the PTO.

Accordingly, it is hereby respectfully requested that prosecution of U.S. application Serial No. 09/856,819 and/or any U.S. application that claims priority or continuing status from or is the national stage of PCT/DK99/00664, published as WO 00/32758 be suspended, during the pendency of the judicial action and until final adjudication of the issues in that judicial action; and, thereafter that an interference be declared.

It is additionally noted that the Examiner in the above-captioned applications can consider the information set forth in the attachment hereto for prior art purposes in the above-captioned applications, *inter alia*. *See* 35 U.S.C. §102(f); *OddzOn Products v. Just Toys,* 122 F.3d 1396 (Fed. Cir. 1997). In *Oddzon* the Federal Circuit held that nonpublic information that an inventor becomes aware of may be combined with other prior art information for purposes of obviousness pursuant to 35 USC 102(f)/103. Since the nature of that which was disclosed to the inventor(s) in the above-captioned applications will be developed in the judicial action, e.g., through discovery, and that which was disclosed may materially impact upon patentability of claims to the present inventor(s) (without Jørn Borch SØE) in the above-captioned applications, this too compels suspension of prosecution in the above-captioned applications during pendency of the judicial action and until final adjudication of the issues in the judicial action.

To any extent a Petition is required for any of the herein requests, or the granting thereof, this paper is to serve as such a Petition.

To any extent a fee is required for the consideration or granting of any of the herein requests or for any Petition required for any of the herein requests (which Petition this paper is to serve as), or the granting thereof, the Commissioner is hereby authorized to charge such a fee, or credit any overpayment in fees, to Deposit Account No. 50-0320.

Indeed, more generally, any fee occasioned by this paper or by any of the herein requests, or for granting of any of the herein requests, or for any Petition required for any of the herein requests (which Petition this paper is to serve as), or the granting thereof, the Commissioner is hereby authorized to charge such a fee, or credit any overpayment in fees, to Deposit Account No. 50-0320.

Furthermore, this paper is presented, and the herein requests made (or if this paper is also considered a Petition, this Petition is made), pursuant to any or all applicable Rules and Sections of the Statute.

CONCLUSION

The suspension of the prosecution of the above-captioned applications during the pendency of the judicial action until final adjudication of the issues therein, with an interference declared, advantageously after final adjudication of the issues in the judicial action, are believed to be in order; and, such relief is respectfully requested.

Respectfully submitted,

Frommer Lawrence & Haug LLP
Attorneys For Danisco A/S and Jørn Borch SØE,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DANISCO A/S and JØRN BORCH SØE	:	01 CIV. 9878
Plaintiffs,	:	
-against-	:	CIVIL ACTION NO. 01-
NOVO NORDISK A/S AND NOVOZYMES A/S	:	
Defendants.	:	

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, Danisco A/S ("Danisco") and Jørn Borch Søe ("Søe"), by and through their undersigned attorneys, for their Complaint against Defendants Novo Nordisk A/S ("Novo Nordisk") and Novozymes A/S ("Novozymes") (individually and collectively "Defendants"), allege as follows:

STATEMENT OF THE CASE

This is an action for correction of inventorship under 35 U.S.C. §§ 116, 256 and in equity; for unfair competition pursuant to the Lanham Act under 15 U.S.C. § 1125(a); and for pendant claims under New York law based on Defendants' failure to name Søe as an inventor on International Application No. PCT/DK99/00664 entitled "Lipolytic Enzyme Variants" ("the PCT Application"), now published as International Publication No. WO 00/32758, and corresponding U.S. Patent Application Serial No. 09/856,819 ("the '819 Application"). Danisco also seeks a declaration that Søe is an inventor on the PCT Application, the '819 Application, and any other U.S. Patent Application and U.S.

Patent and any other patent applications and patents within the jurisdiction of this Court, prosecuted or owned by the Defendants as assignee and corresponding to or claiming priority or continuing status from the PCT Application, the '819 Application or any other patent application that contains or claims subject matter invented by Søe. Danisco further seeks an Order from this Court directing the Defendants to add Søe as an inventor on the PCT Application, the '819 Application, and any other U.S. Patent Application and U.S. Patent and any other patent applications and patents within the jurisdiction of this Court, prosecuted or owned by the Defendants as assignee and corresponding to or claiming priority or continuing status from the PCT Application, the '819 Application or any other patent application that contains or claims subject matter invented by Søe.

PARTIES

1. Danisco is a corporation duly organized and existing under the laws of the Denmark, having an office and principal place of business at Langebrogade 1, P.O. Box 17, DK-1001, Copenhagen K, Denmark. Danisco is doing business in New York at 440 Saw Mill River Road, Ardsley, NY 10502 through its subsidiaries and through its Registered Agent, CSC, 1177 Ave of the Americas, 17th Floor, NY NY 10036-2721.

2. Søe is an employee of Danisco and resides at Orovaeget 11, 8381 Mundelstrup, Denmark. Søe was an employee of Danisco at all times relevant such that he had an obligation to assign his inventions to Danisco.

3. Upon information and belief, Novo Nordisk is a corporation organized and existing under the laws of Denmark, having an office and principal place of business at Novo Alle, DK-2880 Bagsvaerd, Denmark. Upon information and belief, Novo Nordisk is also located and doing business at 405 Lexington Avenue, Suite 6400, New York, NY

10174-6401, in this judicial district.

4. Upon information and belief, Novo Nordisk demergered its enzyme business in or about 2000 into an independent legal entity, Novozymes.

5. Upon information and belief, Novozymes is a corporation organized and existing under the laws of Denmark, having an office and principal place of business at 36 Kragshøjvej, DK- 2880 Bagsværd, Denmark. Upon information and belief, Novozymes is also located and doing business at 405 Lexington Avenue, Suite 6400, New York, NY 10174-6401, in this judicial district.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over the correction of inventorship, Lanham Act and New York state-law claims set forth below by virtue of 15 U.S.C. § 1121, 28 U.S.C. §§ 1331, 1338(a), 1338(b) and 1367. The Court also has subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

7. This Court has personal jurisdiction over Defendants due to, *inter alia*, their presence doing business in New York.

8. Venue is proper in this district under 28 U.S.C. § 1391(b) and (c).

BACKGROUND

9. In the course of his employment with Danisco, Danisco's employee Søe conceived and reduced to practice, *inter alia*, a process for using lipases that selectively hydrolyzed long-chain triglycerides over short-chain triglycerides and that exhibited high activity for phospholipids and glycolipids.

10. Beginning in or about 1997, Danisco and Defendants entered into

discussions regarding a proposed cooperative arrangement concerning lipases for use in making dough systems (the "Arrangement"). In connection with the Arrangement, Danisco and Defendants signed a cooperation agreement ("the cooperation agreement") on April 2, 1998 and March 24, 1998, respectively. The cooperation agreement's effective date was December 1, 1997, with a term of 24 months.

11. Pursuant to the Arrangement, Defendants would supply Danisco with samples of lipases, on information and belief from their existing inventory of lipases, and Danisco would, in turn, select product candidates from its research through screening and testing the lipases. The lipase samples were to be supplied according to Danisco's disclosure to Defendants of the desired characteristics, e.g., high activity for phospholipids and glycolipids.

12. Pursuant to the Arrangement, Danisco provided highly confidential and proprietary information to Defendants, and Defendants had a duty to maintain that information as confidential and proprietary to Danisco. Danisco disclosed to Defendants confidential information and know-how about lipases, including, *inter alia*, information relating to Danisco's knowledge and experience with the ability of lipases to selectively hydrolyze long-chain triglycerides over short-chain triglycerides and to exhibit high activity for phospholipids and glycolipids.

13. Danisco used its know-how and research experience to, *inter alia*, test lipases that selectively hydrolyzed long-chain triglycerides over short-chain triglycerides and that exhibited high activity for phospholipids and glycolipids. Pursuant to the Arrangement, Danisco disclosed, *inter alia*, those tests and results thereof to Defendants.

14. Defendants had a duty to name Søe as an inventor on any patents or patent

applications that contain or claim subject matter invented by Søe.

COUNT I

Correction of Inventorship

15. Plaintiffs restate and re-allege the allegations set forth in paragraphs 1 through 14, as if fully set forth herein.

16. On information and belief, on November 29, 1999, the Defendants filed the PCT Application. The PCT application does not name Søe as an inventor. A copy of the PCT Application published as WO 00/32758 is attached hereto as Exhibit 1.

17. On information and belief, the PCT Application corresponds to the '819 Application pending in the United States Patent and Trademark Office.

18. The PCT and '819 Applications claim (i) a method for preparing dough with lipases that selectively hydrolyze long-chain triglycerides over short-chain triglycerides and that exhibit high activity for phospholipids and glycolipids, and (ii) a method of making a dough product using such lipases.

19. Upon information and belief, Defendants are the assignee(s) of all rights, title and interest in and to the PCT and '819 Applications.

20. The PCT and '819 Applications contain Danisco's confidential information, including the inventions by Søe.

21. Søe is an inventor of subject matter claimed in the PCT and '819 Application and has an obligation to assign his invention to Danisco.

22. Before filing this action, Danisco informed Defendants, *inter alia*, that the concept of developing, selecting or using an enzyme with certain characteristics, including the capability to hydrolyze phospholipids, the capability to hydrolyze

digalactosyl diglyceride, and relatively high activity toward triglycerides with long chain fatty acids as compared to triglycerides with short chain fatty acids, including the use of an enzyme with said characteristics for preparing doughs (e.g. for baking purposes), originated from Danisco, was disclosed to Defendants pursuant to the Arrangement and, together with any patent application relating thereto, is the property of Danisco.

23. On information and belief, Defendants are aware of Danisco's claims but refuse to acknowledge Søe's rights as an inventor and/or Danisco's rights as assignee to the claimed methods in the PCT and '819 Applications for (i) preparing dough with lipases that selectively hydrolyze long-chain triglycerides over short-chain triglycerides and that exhibit high activity for phospholipids and glycolipids, and (ii) making a dough product using such lipases.

24. Specifically, in a letter dated September 9, 2000, the Defendants admitted: "It is correct that representatives of Danisco have, during the Lipase Collaboration, disclosed to Novo Nordisk certain information on developing, selecting or using enzymes..." for use in preparing doughs and making dough products.

25. Before filing this action, Danisco requested from Defendants "firm and solid evidence, in the form of copies of signed laboratory journals or the like, to prove firm that the inventive concept was developed by [the Defendants] independently of information received from Danisco." Defendants have not provided the requested evidence to Danisco. Consequently, Danisco has been forced to bring this action.

26. Søe has a reputational interest in being named or recognized as an inventor on the PCT and '819 Applications.

27. The public has an interest in assuring the correct naming of inventors on

patents.

28. Danisco has an ownership interest in the PCT and '819 Applications as well as a substantial pecuniary interest in any patents issuing therefrom.

29. Danisco has filed a patent application concerning the subject matter invented by Søe with the United States Patent and Trademark Office. Neither Danisco nor Søe may perfect a claim of priority to the PCT Application pursuant to 35 U.S.C. § 120 until Søe is rightfully named as an inventor thereon. If a claim of priority to the PCT Application is not perfected, Danisco may lose all rights, title and interest in and to its inventions.

30. Danisco has filed papers with the Patent and Trademark Office requesting declaration of an interference between the '819 Application and Danisco's pending patent application. If Danisco cannot perfect its claim of priority to the PCT Application, Danisco may face an inappropriate, undue burden of proof in that interference and lose all rights, title and interest in and to its inventions.

31. As a direct and proximate result of Defendants' wrongful acts complained of above, Danisco has been severely harmed by virtue of loss of control over its confidential information, know-how and technology, loss of competitive advantage in the industry and loss of the ability to protect its invention rights. Plaintiffs seek damages in an amount to be determined at trial, and correction of inventorship under 35 U.S.C. §§ 116, 256 and in equity.

COUNT II

Declaration that Jørn Borch Søe Is an Inventor

32. Danisco restates and re-alleges the allegations set forth in paragraphs 1

through 31, as if fully set forth herein.

33. An actual controversy exists between Danisco and Defendants concerning inventorship of the PCT and '819 Applications.

34. If Danisco cannot perfect its claim of priority to the PCT Application, Danisco may face an inappropriate, undue burden of proof in an interference and risks losing all rights, title and interest in and to its inventions.

35. Plaintiffs seek a declaration that Søe is an inventor of the subject matter of the PCT Application, the '819 Application, and any other U.S. Patent Application and U.S. Patent and any other patent applications and patents within the jurisdiction of this Court, prosecuted or owned by the Defendants as assignee and corresponding to or claiming priority or continuing status from the PCT or '819 Applications, or from any other patent application that contains or claims subject matter invented by Søe. Plaintiffs further seek an Order by this Court directing the Defendants to add Søe as an inventor on the patent application(s) and patent(s) described above.

COUNT III

Unfair Competition

36. Plaintiffs restate and re-allege the allegations set forth in paragraphs 1 through 35, as if fully set forth herein.

37. Upon information and belief, Defendants have disclosed and used Danisco's technology and confidential information outside of the terms of the Arrangement. Upon information and belief, Defendants have filed patent applications, including without limitation the '819 Application, that disclose, contain, rely upon, and seek to secure for themselves invention rights in Danisco's confidential information,

know-how and technology.

38. Defendants seek to gain a competitive edge over Danisco in the industry by virtue of Defendants' unfair competition against Danisco.

39. Defendants have, through their actions and as a result of their misappropriation of Danisco's confidential information, know-how and technology "passed off" Danisco's confidential information, know-how and technology as Defendants' own.

40. On information and belief, Defendants' wrongful acts have created an expectation of profit based upon Danisco's confidential information, know-how and technology.

41. As a direct and proximate result of Defendants' wrongful acts, Danisco has been severely harmed by virtue of loss of control over its confidential information, know-how and technology, loss of competitive advantage in the industry and loss of the ability to protect its invention rights. Danisco seeks damages for Defendants' unfair competition in an amount to be determined at trial.

COUNT IV

Unjust Enrichment

42. Plaintiffs restate and re-alleges the allegations set forth in paragraphs 1 through 41, as if fully set forth herein.

43. Upon information and belief, Defendants have used Danisco's confidential information, know-how and technology as Defendants' own, and to obtain and/or apply for patent protection on technology and intellectual property belonging to Danisco.

44. To the extent that Defendants have profited from these actions,

Defendants have been unjustly enriched at Danisco's expense. Furthermore, if a patent issues from the '819 Application, or from any other U.S. or other Patent Application within the jurisdiction of this Court, prosecuted or owned by the Defendants as assignee and corresponding to or claiming priority or continuing status from the PCT Application, the '819 Application, or any other patent application that contains or claims subject matter invented by Søe, without Søe named thereon as an inventor, the Defendants are unjustly enriched.

45. As recompense for Defendants' wrongful acts complained of above, Danisco demands a constructive trust over Defendants' profits and revenue relating to any misuse of Danisco's confidential information, know-how and technology.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

A. A judgment that Defendants are liable for each claim asserted above;

B. A judgment directing Defendants to pay Danisco damages suffered as a result of Defendants' wrongful acts complained of herein at an amount to be determined at trial;

C. A judgment directing Defendants to pay Danisco all appropriate punitive or exemplary damages as allowed by law;

D. A declaration that Søe is an inventor on the PCT Application, the '819 Application, and any other U.S. Patent Application and U.S. Patent and any other patent applications and patents within the jurisdiction of this Court, prosecuted or owned by the Defendants as assignee and corresponding to or claiming priority or continuing status from the PCT Application, the '819 Application, or any other patent application that

contains or claims subject matter invented by Søe.

E. A judgment directing Defendants to add Søe as an inventor on the PCT Application, the '819 Application, and any other U.S. Patent Application and U.S. Patent and any other patent applications and patents within the jurisdiction of this Court, prosecuted or owned by the Defendants as assignee and corresponding to or claiming priority or continuing status from the PCT Application, the '819 Application, or any other patent application that contains or claims subject matter invented by Søe.

F. An award of costs and expenses in this action consistent with, *inter alia*, 35 U.S.C. § 285 because this is an exceptional case;

G. An award of Danisco's reasonable attorneys' fees incurred in this matter;

H. An award of pre- and post-judgment interest on all damages awarded herein at the rate provided by law; and

I. Such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury of all issues triable as of right by a jury.

Dated: November 20, 2001

New York, New York

Respectfully submitted,

FROMMER LAWRENCE & HAUG LLP

By: _____

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